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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD M. ELDREDGE,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

Petition for Writ of Certiorari to the Utah Supreme Court.

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QUESTIONS PRESENTED

1. Whether the application of Utah Code Ann. §§ 76-5-410 and -411 in a trial for actions occurring before their enactment violated the ex post facto clause of article I, section 10 of the United States Constitution and the due process clause of the Fourteenth Amendment.

2. Whether the admission into evidence of hearsay statements of a child witness without considering their reliability, as required by Utah Code Ann. § 76-5-411, violates the Sixth Amendment's confrontation clause, as applied to the states by the Fourteenth Amendment.

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RICHARD M. ELDREDGE,

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vs.

STATE OF UTAH,

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Petition for Writ of Certiorari to the Utah Supreme Court.

Petitioner, Richard M. Eldredge, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Utah Supreme Court in this case.

OPINION OF THE COURT BELOW

The opinion of the Utah Supreme Court, State v. Eldredge, appears in the Appendix hereto, p. A-1.

JURISDICTION

The opinion of the Utah Supreme Court affirming the Petitioner's conviction was filed on February 1, 1989 (see Appendix, p. A-1), and the Petitioner's timely filed Petition for Rehearing was denied on March 30, 1989 (see Appendix, p. A-28).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, section 10 of the United States Constitution provides in pertinent part:

> No State shall . . . pass any . . . ex post facto Law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

At the time of trial, section 76-5-410 of the Utah Code read:[1]

> Notwithstanding any other provision of law or rule of evidence, a child victim of sexual abuse, under the age of ten, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony.

At the time of trial, section 76-5-411 of the Utah Code read:[2]

> (1) Notwithstanding any other provision of law or rule of evidence, a child victim's out of court statement regarding sexual abuse of the child is admissible into evidence though it does not qualify under an existing hearsay exception, so long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge shall determine whether the general purposes of the evidence are such that the interest of justice will best be served by admission of the statement into evidence. In addition, the court shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness, in deciding whether to admit such a statement.

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1 The statute was amended in 1985 to delete the phrases "Notwithstanding any other provision of law or rule of evidence" and "be permitted to" and to make minor changes in phraseology.

2 Section 76-5-411 was amended in 1985 and again in 1988, but "any changes pertinent to this case do not appear to have been of substance." State v. Eldredge, No. 20558, slip op. at 4 n.3 (infra at A-5 n.3) (Utah Feb. 1, 1989).

(2) A statement may be admitted under this exception only if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with an opportunity to prepare to meet it, his intention in offering the statement, and the particulars of it.

(3) For purposes of this section, a child is a person under the age of ten.

STATEMENT OF THE CASE

This case arose out of an ex-wife's claim, made in the heat of an ongoing dispute over visitation rights, that her former husband had abused their child. While the allegations roared, the proof whispered.[3] The facts relevant to this Petition are as follows:

In October 1981, the Petitioner, Richard M. Eldredge ("Eldredge"), and his wife, Suzanne, were divorced. At the time, they had a two-year-old son named Zachary. Mrs. Eldredge was awarded custody of Zachary, and Eldredge was awarded reasonable visitation rights. However, Eldredge never enjoyed reasonable visitation rights. Shortly after the divorce decree was entered, Eldredge had to seek an order to show cause to enforce his visitation rights. Despite Mrs. Eldredge's resistance, Eldredge took Zachary on various occasions.

In June 1982, Mrs. Eldredge remarried. The following week Mrs. Eldredge, now Mrs. Sanchez, sought to have her divorce decree modified to limit Eldredge's visitation rights with Zachary to once every twenty-seven days because Eldredge had allegedly tried to turn Zachary against his mother and her new husband. Mrs. Sanchez's amended petition to modify the decree said nothing about any alleged sexual abuse, even though all of the statements and actions of Zachary that Mrs. Sanchez claims led her to conclude that Zachary had been sexually abused, had already occurred.

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[3] Cf. Elman, Response, 100 Harv. L. Rev. 1949, 1952 (1987).

From January to April 1983, Mrs. Sanchez denied Eldredge visitation altogether for the purported reason that Zachary had pneumonia or tuberculosis. (Zachary never had tuberculosis but did develop walking pneumonia in March 1983.) The court heard Mrs. Sanchez's amended petition on April 14, 1983, and ordered that visitation resume. Nothing in the visitation order suggests anything about sexual abuse, even though every alleged incident of sexual abuse for which Eldredge was ultimately convicted had occurred before the visitation hearing.

Having failed to curtail Eldredge's visitation rights, in July 1983 Mrs. Sanchez reported to the Salt Lake County Sheriff's Office that she suspected that Eldredge had sexually abused Zachary. This was the first suggestion of sexual abuse. Mrs. Sanchez based her allegation on the following facts: After some of his visits with Eldredge, Zachary had diarrhea. On one occasion, after returning from a visit with Eldredge and while his mother was changing his diaper, Zachary said to his mother, "Look at my pee-pee. Look at it. Taste it. It is good." (Zachary was two years old at the time.) On four other occasions, after visits with his father, Zachary took his clothes off and acted like a dog.

The Sheriff's Office referred Mrs. Sanchez to Thomas G. Harrison, a clinical social worker. Zachary's stepfather took him to see Mr. Harrison in August 1983 and told Mr. Harrison that Eldredge had been sexually abusing Zachary during visitation. At the time Mr. Harrison interviewed Zachary concerning the alleged incidents of sexual abuse, Zachary was not yet four years old. Based on one interview with Zachary and a "History of Sexual Behavior" compiled by Mrs. Sanchez, describing various statements and actions that Zachary made of a sexual nature, Mr. Harrison concluded that Zachary had been involved in sexual activities with Eldredge and wrote a letter to the Sheriff's Office stating his conclusions.

On April 3, 1984, a criminal information was filed against Eldredge, charging him with twenty counts of sodomy upon a child. All but four of those counts were later dismissed for lack of evidence. The four counts were all

based on events that allegedly occurred between March and December 1982. The probable cause statement giving rise to the information was based on Mr. Harrison's letter and statements by Mrs. Sanchez to the effect that Zachary had exhibited signs of "trauma," including diarrhea, after visiting his father and that Zachary had told her on numerous occasions that Eldredge had touched and licked Zachary's penis.[4]

Eldredge's trial commenced on September 26, 1984. Before any evidence was presented, the court denied Eldredge's motion to conduct an in-camera examination of Zachary to review Zachary's competency, his ability to understand the truth and his personal knowledge of the events in question. The trial court's ruling was based on a newly-enacted statute--Utah Code Ann. § 76-5-410--which made a child victim of sexual abuse a competent witness and required that he be allowed to testify without prior qualification. Without any prior foundational examination of Zachary, the court also granted the State's motion to conduct the examination of Zachary by leading questions.

Zachary testified at trial, but his testimony was inconclusive. He was barely five years old at the time. He showed confusion when asked such simple things as his name. He changed his story often and rarely gave the same answer to the same question. As often as not, his response to a question was, "It's hard to think." In response to the prosecutor's leading questions, Zachary testified that his father had touched and licked his "wienie" and that Zachary had done the same to his father. However, on redirect examination, Zachary denied it. On cross-examination, Zachary said that he was testifying from what others had talked to him about and not from his own recollection. When Zachary was asked about his visits with Mr. Harrison, he could not even remember the circumstances of his most recent visit.

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[4] There was evidence of only one such statement at trial, and that statement was allegedly made well after Mrs. Sanchez had accused Eldredge of abusing Zachary.

The other evidence at trial showed the following:

1. Zachary had once asked his mother, while she was changing his diaper, to look at and taste his "pee-pee."

2. Zachary often acted very emotional after visiting his father and sometimes had diarrhea after visitations. (The evidence also showed that Zachary had a problem with diarrhea since he was two or three months old and had had diarrhea during the first three months of 1983, when Eldredge did not see him.)

3. Zachary occasionally took off his clothes and pretended to be a dog after visitation. (The evidence also showed that Zachary had first acted this way in August or September 1981, before his parents were ever divorced.)

4. On his visits with Mr. Harrison, Zachary would perform "inappropriate play" with anatomically correct dolls.

5. On his visits with Mr. Harrison, Zachary would turn pale and act either agitated or lethargic when discussing sexual matters and would sometimes relieve himself in his pants. (Mr. Harrison testified that there was no data connecting uncontrolled urination and defecation with sexual abuse and that any such connection was just speculation.)

Had this been all the evidence in the case, the court would have had to discharge Eldredge. However, the court also admitted certain hearsay statements of Zachary, principal of which were the following:

1. Mrs Sanchez testified that Zachary told her in October 1983--ten months after the alleged event and three months after she had told the Sheriff's

Office that Eldredge had abused Zachary--that he and his father played a game called "frisky" in which they would lick each other's penises.

2. Mr. Harrison testified that Zachary told him that he played "frisky" with his father and that each would lick the other's bottom and penis.

3. Mr. Harrison testified that Zachary told him that Eldredge would make his penis hard by squeezing, stroking and flicking it.

4. Mr. Harrison testified that Zachary said that Eldredge had told him never to "tell anyone about penis" and had told him that he could not tell anyone the truth because he did not know what the truth was.

Over Eldredge's objections, these statements were offered and admitted under section 76-5-411 of the Utah Code, which was enacted in 1983--after all of the alleged occurrences for which Eldredge was convicted. Section 76-5-411 made admissible "a child victim's out-of-court statement regarding sexual abuse of the child" even though it did not qualify under an existing hearsay exception, so long as the child testified or there was other corroborative evidence of the abuse. Before such a statement could be admitted into evidence, however, the statute required the judge to "determine whether the general purposes of the evidence are such that the interest of justice will best be served by admission of the statement into evidence" and to consider "the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness." The trial court did not make the required determination, nor did it consider the factors listed.

The defendant was convicted on all four counts of the amended information. His motion for a new trial was denied, and he was sentenced to an indeterminate term of from five years to life on each count, with the sentences to run concurrently.

On appeal to the Utah Supreme Court, the defendant raised numerous issues, including his claims that the retroactive application of sections 76-5-410 and -411 to his case violated his rights under the ex post facto clause and that the trial court's application of section 76-5-411 violated his confrontation rights under the Sixth and Fourteenth Amendments--claims that he had first raised by his pretrial Motion to Limit Testimony, which was denied. By a 3-2 decision, the Utah Supreme Court affirmed Eldredge's convictions. The court first rejected Eldredge's ex post facto and confrontation claims. Then, in the face of a record replete with proper objections, see State v. Eldredge, No. 20558, slip op. at 16-18 (infra at A-19 through -21) (Howe, J., dissenting), the court found that any claim based on the trial court's misapplication of section 76-5-411 had not been properly preserved and analyzed it under the plain error rule. Under the two-step plain error analysis that the court adopted, Eldredge had to first show that it should have been obvious to the trial court that it was committing error when it admitted the hearsay statements without making the statutorily required determination, and, second, that the error affected his substantial rights. The court did not reach the second question because it found that the error was not obvious or "plain."

REASONS FOR GRANTING THE PETITION

This case involves a conflict between two important social issues: the need to deal with child sexual abuse and the need to protect the constitutional rights of an accused.

In response to public outcry over child sexual abuse, the legislatures of at least twenty states, including Utah, have passed legislation designed to facilitate the prosecution of alleged child sexual abusers by relaxing evidentiary standards.[5] In the process, legislatures have

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[5] For a child competency statute similar to Utah Code Ann. § 76-5-410, see Mo. Ann. Stat. § 491.060(2) (Vernon Supp. 1989). For hearsay exception

tried to safeguard the constitutional rights of the accused. However, where, as here, the statutes are applied retrospectively and are not followed, those rights are violated.

1. The Petitioner was convicted of four counts of forcible sodomy upon a child. All of the alleged crimes took place in 1982. In 1983, the Utah Legislature passed two new statutes--Utah Code Ann. §§ 76-5-410 and -411--designed to make convictions of child sexual abusers easier. The trial court's retroactive application of sections 76-5-410 and -411 in this case violated the constitutional prohibition against ex post facto laws, U.S. Const. art. I, § 10, and the due process clause of the Fourteenth Amendment.[6]

This Court long ago stated that the ex post facto prohibition applied to "[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), quoted in Miller v. Florida, 482 U.S. 423, 429 (1987). The Utah Supreme Court labeled this pronouncement "dicta" which "has long since been rejected." State v. Eldredge, No. 20558, slip op. at 6 n.6 (infra at A-8 n.6). This Court should grant the petition for certiorari to determine whether there is anything left of

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statutes similar to Utah Code Ann. § 76-5-411, see Alaska Stat. § 12.40.110 (Supp. 1988); Ariz. Rev. Stat. Ann. § 13-1416 (Supp. 1988); Ark. Stat. Ann. § 16-41-101, Rule 803 (25) (1987); Cal. Evid. Code § 1228 (West Supp. 1989); Colo. Rev. Stat. § 13-25-129 (1987); Fla. Stat. Ann. § 90.803 (23) (West Supp. 1989); Idaho Code § 19-3024 (1987); Ill. Ann. Stat. ch. 38 ¶ 115-10 (Smith-Hurd Supp. 1988); Ind. Code Ann. § 35-37-4-6 (Burns Supp. 1988); Kan. Stat. Ann. § 60-460(dd) (Supp. 1988); Me. Rev. Stat. Ann. tit. 15, § 1205 (Supp. 1988); Minn. Stat. §§ 260.156 (West Supp. 1989) & 595.02 (3) (West 1988); Miss. Code Ann. § 13-1-403 (Supp. 1988); Mo. Ann. Stat. § 491.075 (Vernon Supp. 1989); Okla. Stat. Ann. tit. 12, § 2803.1 (West Supp. 1989); 42 Pa. Cons. Stat. Ann. § 5986 (Purdon Supp. 1988); S.D. Codified Laws Ann. § 19-16-38 (1987); Tex. Code Crim. Proc. Ann. art. 38.072 (Vernon Supp. 1989); Wash. Rev. Code Ann. § 9A.44.120 (1988).

[6] "If a state legislature is barred by the Ex Post Facto Clause from passing ... a law, it must follow that a State ... Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964).

Calder's "dicta" in light of the Court's subsequent decisions, including Miller v. Florida, 482 U.S. 423 (1987) (which quoted Calder approvingly), and Beazell v. Ohio, 269 U.S. 167 (1925).

The Court later clarified the scope of the ex post facto clause. No ex post facto violation occurs if the change effected by a statute is "merely procedural." Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981). However, if an alteration, although procedural in form, alters a substantial right, it cannot be applied retrospectively. Id. Whether "alterations of procedure" are "of sufficient moment" to violate the ex post facto clause is a question of degree. Beazell v. Ohio, 269 U.S. 167, 171 (1925).

In 1982, when the crimes for which Eldredge was convicted allegedly occurred, under Utah law children under the age of ten were incompetent to testify absent prior qualification showing their competence in fact. Utah Code Ann. § 78-24-2(2) (1977); State v. Wilkerson, 612 P.2d 362, 364 (Utah 1980). In 1983, the Utah Legislature enacted section 76-5-410 of the Utah Code, which allows a child victim of sexual abuse to testify in any judicial proceeding without prior qualification, regardless of his competency in fact.

Under Utah law as it existed in 1982, hearsay statements were inadmissible unless they fit within a recognized exception to the hearsay rule. In 1983, the Utah Legislature also enacted section 76-5-411, which made admissible a child victim's hearsay statements regarding sexual abuse if the child testified, regardless of whether the statement qualified under an existing hearsay exception.

Sections 76-5-410 and -411 were part of the Child Kidnaping and Sexual Abuse Act, 1983 Utah Laws ch. 88, which, besides changing existing evidence rules, created new offenses, see, e.g., id. §§ 18-20, 22 & 24, did away with certain defenses, id. § 2, restricted probation and suspension of sentences for certain offenses, id. § 7, created more severe penalties for certain felonies, id. §§ 8 & 9, and required registration by sex offenders, id. § 42. All of these

measures were designed to make easier the apprehension and conviction of child sexual abusers and make their punishment more severe. State v. Rimmasch, No. 20760, slip op. at 1-2 (Utah May 17, 1989).

Standing alone, section 76-5-410 may not implicate the ex post facto clause if applied retroactively. See Hopt v. Utah, 110 U.S. 574 (1884) (a statute enlarging the class of persons competent to testify can be applied ex post facto). However, given its clear purpose and its effect when applied in conjunction with section 76-5-411, the statute cannot constitutionally be applied retrospectively.

If Zachary had been called to testify under the statute in effect when the alleged crimes were committed, Eldredge could have insisted that he be prequalified as a witness to determine whether he was capable of accurately perceiving, remembering and relating the pertinent facts and whether he had a sense of moral duty to tell the truth. Zachary's trial testimony suggested that he was in fact not a competent witness. Eldredge was precluded from challenging Zachary's competency, however, by the retroactive application of section 76-5-410. And the retroactive application of section 76-5-411 allowed hearsay statements of the incompetent child witness--made at a time when he was even less competent--to be admitted into evidence merely because he also testified at the trial.

The retroactive application of the two statutes together deprived Eldredge of a substantial right and violated the ex post facto clause by allowing Eldredge to be convicted on different testimony than the law required at the time he allegedly committed the offenses--namely, the hearsay statements of an incompetent child witness that did "not qualify under an existing hearsay exception." Moreover, for the reasons discussed infra, the operation of the two statutes in tandem also deprived Eldredge of his confrontation rights under the Sixth and Fourteenth Amendments by depriving him of a meaningful opportunity to test the reliability of the hearsay statements.

Because the formerly inadmissible hearsay was the only evidence on which a conviction could properly be based, but for the trial court's retrospective application of the Utah statutes, Eldredge would have been acquitted. Such a change in the applicable law clearly deprived him of a substantial right: "[W]here guilt or innocence turns on the application of the [newly enacted] law, therefor affecting and disadvantaging the defendant in the most substantial manner possible," the ex post facto prohibition is violated. Walker v. State, 433 So.2d 469, 473 (Ala. 1983). The retroactive application of sections 76-5-410 and -411 worked such a substantial disadvantage to Eldredge's rights as to violate the ex post facto clause.

2. The trial court's failure to consider the reliability of Zachary's hearsay statements before admitting them, as required by Utah Code Ann. § 76-5-411, violated the Petitioner's rights under the confrontation clause of the Sixth Amendment.[7]

This is not a case where there was objective, physical evidence of sexual abuse or where there was other corroborative evidence of either the fact of abuse or the identity of the alleged abuser. This is not a case where the evidence of abuse was immediately reported. This is not a case where there was clear, unambiguous testimony from the alleged victim of the abuse or where the alleged child victim was allowed to relate his observations and experiences in response to neutral questions without having his responses contaminated by countless interviews, counseling sessions and leading questions. Nor is this a case where the accuser lacked an ulterior motive. Rather, it is a case where the accused was convicted solely on the basis of hearsay statements.

Under these circumstances, the Sixth Amendment's confrontation clause, as well as Utah Code Ann. § 76-5-411, required the trial court to determine whether the hearsay statements bore sufficient indicia of

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[7] The Sixth Amendment's confrontation clause applies to the states under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965).

reliability before admitting them into evidence. The trial court's failure to do so violated the Petitioner's constitutional rights.[8]

The confrontation clause of the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Read literally, the confrontation clause would exclude all hearsay statements at trial. Such a result is clearly "unintended and too extreme." Ohio v. Roberts, 448 U.S. 56, 63 (1980). However, this Court has recognized that the confrontation clause places important limits on those hearsay statements that can be admitted into evidence. Id.

The limits on the admissibility of hearsay under both the Sixth Amendment and rules of evidence stem from the inherently unreliable nature of hearsay. By definition, hearsay is not the best available evidence. It is a statement other than one made by the declarant while testifying at trial and thus one that does not comply "with all the ideal conditions for testifying," which are designed to bring out the truth. See Fed. R. Evid. 801 Advisory Committee Note on subdivision (c). See also Utah R. Evid. 801(c). The evidence is doubly defective where, as here, it is once removed, that is, where it comes in through the testimony of someone other than the declarant, since "the possibility of distortion increases with transfers of testimony." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 602[01] (1988).

To assure that the confrontation clause fulfills its "mission" of advancing "the accuracy of the truth-determining process in criminal trials," Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion), a hearsay statement must possess some "indicia of reliability." Roberts, 448 U.S. at 66.

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[8] Eldredge does not claim that Utah Code Ann. § 76-5-411 is facially unconstitutional. Rather, he claims that, if the statute could be applied in his case, the trial court's failure to make the determination required by the statute deprived him of his Sixth Amendment rights.

The Utah legislature tried to comply with this requirement when it passed section 76-5-411. Under section 76-5-411, before an alleged child victim's out-of-court statements can be admitted into evidence, either the child must testify, or there must be other corroborative evidence of the abuse. In this case, there was not other corroborative evidence of the abuse, so the child's hearsay statements were only admissible because he testified.

Ordinarily, if the hearsay statement comes in through the declarant at trial, there are sufficient indicia of reliability because the declarant testifies under oath, subject to cross-examination and in the presence of the jury, who can see his demeanor and judge his credibility. Although cross-examination usually satisfies the requirements of the confrontation clause, see, e.g., California v. Green, 399 U.S. 149, 158 (1970), this Court has never said that those requirements are met simply because the declarant takes the stand at trial. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974) (right of confrontation violated where witness was not subject to cross-examination as to his juvenile record); Smith v. Illinois, 390 U.S. 129 (1968) (confrontation violation where defendant was barred from asking a prosecution witness his name and address).

The Utah legislature recognized the dangers in admitting the hearsay statements of a child victim simply because he testifies and required, under section 76-5-411, that the trial court consider the reliability of the statements and determine whether their admission would best serve the interest of justice before admitting the statements, regardless of whether or not the child declarant testified.

This case illustrates the dangers of admitting through the testimony of a third party the hearsay statements of a child witness without first determining whether the statements have sufficient indicia of reliability.

a. The child witness may be incompetent, even though he is allowed to testify. Zachary's frequent changes in his trial testimony suggest that he may not have

remembered the events in question, may not have been able to distinguish completely between fact and make-believe or may not have fully understood his obligation to tell the truth--minimum requirements for competency.[9] See, e.g., United States v. Lightly, 677 F.2d 1027, 1028 (4th Cir. 1982); State v. Sanchez, 11 Utah 2d 429, 361 P.2d 174, 175 (1961); Utah R. Evid. 602 & 603. Indeed, the only reason that Zachary was allowed to testify without a prior determination as to his competency was because newly enacted section 76-5-410 conclusively presumed that a child victim of sexual abuse under the age of ten was a competent witness and required that he "be allowed to testify without prior qualification." Eldredge was precluded by the statute and the trial court's ruling from challenging Zachary's competency. And the two new statutes--Utah Code Ann. § 76-5-410, allowing Zachary to testify regardless of his actual competency, and Utah Code Ann. § 76-5-411, allowing into evidence his hearsay statements simply because he testified--placed Eldredge in a Catch-22 situation. He could not keep Zachary from testifying on the grounds of incompetency, and, because Zachary testified, his most unreliable, untested and untestable hearsay statements--made over a year before, when he was even less competent--were admitted. The trial court's application of the two statutes in this case deprived Eldredge of a meaningful opportunity to test the reliability of Zachary's hearsay statements. And, to the extent that application permitted the admission of the otherwise inadmissible hearsay statements of an incompetent witness, it violated Eldredge's confrontation rights. See Comment, Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception, 7 U. Puget Sound L. Rev. 387 (1984).

b. The child may in fact be unavailable for cross-examination regarding the hearsay statements. Even though a declarant testifies at trial, he may be "unavailable" for purposes of the hearsay rule if he does not remember his prior, out-of-court statement. See Utah R.

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[9] Indeed, were Zachary competent to testify regarding the alleged abuse, there would have been no need to admit his hearsay statements. Those statements would have been merely cumulative.

Evid. 804(a)(3). In this case, when Eldredge's trial attorney asked Zachary about critical circumstances of his visits with Mr. Harrison, Zachary answered that he could not remember. It is not surprising that a five-year-old would not remember statements he had allegedly made a year before concerning events that had happened a year before that. But that same lack of memory precluded Eldredge from cross-examining Zachary concerning his prior, hearsay statements and thus deprived Eldredge of his confrontation rights.[10]

c. Because the statements come from a third party and not from the child declarant, the trier of fact may give them undue weight. If a child testifies and his testimony, like Zachary's, is equivocal, contradictory and confused, the jury may give it little weight. However, when a hearsay statement is admitted not through the testimony of the child but through the testimony of an articulate, polished professional, the jury may accord it great weight (especially where, as here, the expert was also allowed, over Eldredge's objection, to give his opinion as to the truthfulness of Zachary's statements).[11] Under such circumstances, the jury's foremost concern is the witness's credibility and not the declarant's.

For all of these reasons, it is not enough that a child witness simply take the stand.[12] Before his hearsay

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[10] Eldredge's inability to cross-examine Zachary concerning the hearsay statements distinguishes this case from State v. Nelson, 725 P.2d 1353 (Utah 1986), in which the Utah Supreme Court held that the defendant's confrontation rights were not violated where he had a full and fair opportunity to cross-examine the child declarant concerning her hearsay statements and simply chose not to do so.

[11] The Utah Supreme Court has recently held that, as a matter of state evidence law, such testimony constitutes reversible error. State v. Rimmasch, No. 20760, slip op. at 5 (Utah May 17, 1989).

[12] Also, for all of these reasons this case is different from United States v. Owens, 484 U.S. 554, 108 S. Ct. 838 (1988), and Delaware v. Fensterer, 474 U.S. 15 (1985). In both of those cases, the hearsay statements came in through the testimony of the declarant himself, who was a competent witness. Although the declarant could not remember at trial the basis for his prior, out-of-court statement, he could remember making the statement and was subject to cross-examination concerning the meaning of the statement and the circumstances at the time he made the statement.

statements may be admitted into evidence, they should have some other indicia of reliability.

This Court has found sufficient indicia of reliability "where the evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. at 66. In this case, the prosecution did not claim and neither the trial court nor the appellate court found that the hearsay statements came within any "firmly rooted" exception. The only basis for admitting the statements was section 76-5-411 of the Utah Code, and an exception created by a statute enacted only a year before trial "could hardly be viewed as firmly rooted." Coy v. Iowa, 108 S. Ct. 2798, 2803 (1988).

Section 76-5-411, like similar statutes in other jurisdictions, was intended to satisfy constitutional requirements by requiring the trial court to consider the circumstances surrounding the hearsay statement and to determine whether admission of the statement would best serve the interest of justice before admitting the statement into evidence, regardless of whether or not the child declarant testifies. See State v. Nelson, 725 P.2d 1353, 1356 n.3 (Utah 1986); State v. Myatt, 237 Kan. 17, 697 P.2d 836, 842 (1985). Given the dangers inherent in hearsay statements by young children, it was incumbent on the trial court to make the statutorily required determination before admitting the statements. The Utah Supreme Court has repeatedly emphasized the importance of such an inquiry in the face of constitutional challenges to the application of the statute. See State v. Eldredge, No. 20558, slip op. at 7-8 (infra at A-9 through -10); State v. Fulton, 742 P.2d 1208, 1219 n.16 (Utah 1987); Nelson, 725 P.2d at 1356 n.3. Yet the trial court failed to consider any of the factors listed in the statute.[13] If it had, it would have excluded the hearsay testimony in the "interest of justice."

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13 The Petitioner does not claim that the confrontation clause constitutionalizes the list of factors in section 76-5-411. He simply claims that, where the prosecution offers a hearsay statement that does not fit within a firmly rooted exception to the hearsay rule, the trial court is required to consider the reliability of the statement under all of the surrounding facts and circumstances before allowing the statement into evidence.

All of the factors set forth in the statute militated against admission of the hearsay statements: Zachary was not yet four years old when the first statements were allegedly made, and the statements related to events that had occurred as much as seventeen months before that, when Zachary was two years old. Moreover, Zachary often lived in a fantasy world peopled with imaginary friends. He often pretended to be animals, including a unicorn, a mouse and a red bull, as well as a dog. The alleged abuse, like Eldredge's visitations, was sporadic and had not occurred for the seven months preceding any allegation of abuse. Moreover, although serious, the nature of the alleged abuse was not such that it would have physically harmed Zachary, imprinting the alleged events on his memory. At trial, Zachary showed a loving and trusting relationship with his father. The hearsay statements about which Mr. Harrison testified were extracted from Zachary after Mrs. Sanchez had already accused Eldredge of sexual abuse and were made in the course of therapy sessions involving potentially suggestive methods which Mr. Harrison could not clearly recall and of which he did not keep detailed notes. Finally, Zachary's mother testified that she would not believe Zachary if he said that Eldredge had hit him unless she had other proof.[14]

Had the trial court considered any of the factors listed in section 76-5-411 and made the required determination, it would have concluded that the offered hearsay statements were too unreliable to be admitted. The trial court's failure to make the required determination deprived Eldredge of his Sixth and Fourteenth Amendment rights by allowing him to be convicted based on hearsay statements lacking any indicia of reliability.

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[14] The only other evidence going to the reliability of the hearsay statements was Mr. Harrison's testimony that Zachary's generalized symptoms and psychological characteristics were consistent with a profile of a sexually-abused child. The Utah Supreme Court has recently held that "the necessary threshold reliability of such testimony has yet to be established" and that its reliability must be established before it can be admitted into evidence. State v. Rimmasch, No. 20760, slip op. at 24 (Utah May 17, 1989).

CONCLUSION

Because of the seriousness of the offense and the problems of proof associated with it, courts should be especially vigilant in protecting the constitutional rights of accused child sex abusers. The petition for writ of certiorari should be granted.

Respectfully submitted,

_____

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MAY 1989

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the _____ day of May, 1989, three copies of the foregoing Petition for Writ of Certiorari to the Utah Supreme Court were deposited in a United States mailbox, with first-class postage prepaid, addressed to counsel of record for the Respondent:

R. PAUL VAN DAM
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The undersigned further certifies that all parties required to be served have been served.

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Appellee,

v.

Richard M. Eldredge,
Defendant and Appellant.

No. 20558

FILED
February 1, 1989

Geoffrey J. Butler,
Clerk

Third District, Salt Lake County
The Honorable Homer F. Wilkinson

Attorneys: Stewart M. Hanson, Jr., Michael W. Homer, Salt Lake City, for defendant
R. Paul Van Dam, Sandra L. Sjogren, Salt Lake City, for plaintiff

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ZIMMERMAN, Justice:

Defendant Richard M. Eldredge appeals from his jury conviction of four counts of sodomy on a child, in violation of section 76-5-403 of the Code. He makes several claims of error relating to, inter alia, the following: admission of the child victim's testimony and hearsay statements, exclusion of polygraph evidence and evidence of a witness's bias, sufficiency of the evidence, and failure to grant a motion for a new trial or an arrest of judgment based on exculpatory evidence discovered after trial. We affirm.

When Eldredge's son was two years old, Eldredge and the boy's mother, Suzanne Sanchez, separated and then divorced. Sanchez was awarded custody of their son, and Eldredge was granted visitation rights. At a hearing held a

year and a half later, Sanchez unsuccessfully sought modification of the divorce decree to reduce the frequency of Eldredge's visits. Within a few months of the hearing, Sanchez reported to the sheriff's office that she suspected Eldredge of sexually abusing their son.

Shortly after that report was made, Thomas Harrison, a social worker and director of the Child Sexual Abuse Program in the Department of Psychiatry at Primary Children's Medical Center, interviewed the boy and concluded that he was probably the victim of sexual abuse. Harrison immediately reported this conclusion to the sheriff's office and began treating the child, which he continued to do for approximately one year.

Eldredge was charged and tried on four counts of sodomy on a child, a first degree felony. See Utah Code Ann. § 76-5-403 (Supp. 1979). At trial, several witnesses, including the victim, the victim's mother, and Harrison, testified for the prosecution. The boy, then five years old, used anatomically correct dolls to demonstrate his testimony of oral sexual abuse. Although his testimony was somewhat confused and contradictory, the boy did state that he was telling the truth when he testified that Eldredge had committed the oral sodomy.

Sanchez testified that her son had exhibited bizarre behavior and symptoms of illness shortly after returning from various visits with Eldredge. Specifically, she said that on one occasion, the child told her to look at and taste his penis because it tasted good. And on several occasions after visits, the boy demonstrated disassociative behavior such as lapsing into unresponsive states during which he removed all of his clothing and pretended to be a dog, appeared to be stunned, or sobbed uncontrollably. Immediately after visits, the child was often pale and vomited or had diarrhea, according to Sanchez's testimony.

Harrison testified that when he and the child discussed sexual abuse, the boy exhibited the same types of disassociative behavior and symptoms described by Sanchez. The child lapsed into various imaginary animal

characterizations and expressly refused to be himself. He suffered from enuresis and encopresis (uncontrolled urination and defecation) and attributed his behavior to the imaginary animals. Harrison then discussed professional literature on child sexual abuse, compared the boy's behaviors and symptoms to those described in the literature, and concluded that they were consistent with the child's having been the victim of sexual abuse.

Harrison also testified that during their therapy sessions, the boy had described and demonstrated the physical acts of abuse by using anatomically correct dolls and had attributed the abuse to Eldredge. Harrison repeated various other out-of-court statements made to him by the boy, such as the child's description of Eldredge's erection and ejaculation. He testified that such a young child's ability to describe and demonstrate sexual acts strongly indicated personal exposure to and involvement in those acts and that in his opinion, the boy was the victim of sexual abuse. Finally, he testified that it was his opinion that the child's statements made during therapy were truthful, including his statements attributing the sexual abuse to Eldredge.

Several witnesses testified for the defense. Eldredge took the stand and denied the abuse. The jury found him guilty, in October 1984, on all four counts. The trial court sentenced him to four concurrent terms of imprisonment, each for five years to life, under the first degree felony sentencing provisions of the Code. See Utah Code Ann. §§ 76-3-203(1) (1978). Eldredge appeals. We will consider his claims of error seriatim.

Eldredge first asserts that the trial court's retroactive application of sections 76-5-410 and -411 of the Code ran afoul of the federal ban on ex post facto laws because it operated to narrow the scope of his federal constitutional right to confront the witnesses against him.[1] See U.S. Const. art.

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[1] Eldredge contends that article I, section 18 of the Utah Constitution affords precisely the same protection as does the federal ex post facto provision. Because Eldredge has done nothing more to brief this issue than cite one inapposite case, we choose not to address the state provision. Our analysis is

I, § 10, amends. VI, XIV. Section 76-5-410 provides that a child victim of sexual abuse shall be considered competent to testify at trial without prior qualification.[2] Utah Code Ann. § 76-5-410 (Supp. 1983). Section 76-5-411 makes such a child's out-of-court statements regarding the abuse admissible if certain requirements are met, even if the evidence would

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limited to the federal provision. See State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988); State v. Earl, 716 P.2d 803, 805-06 (Utah 1986).

[2]At the time of Eldredge's trial, section 76-5-410 read as follows:

> Notwithstanding any other provision of law or rule of evidence, a child victim of sexual abuse, under the age of ten, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony.

Utah Code Ann. § 76-5-410 (Supp. 1983). This language was altered somewhat in 1985, but its substance does not appear to have been changed. See Utah Code Ann. § 76-5-410 & compiler's notes (Supp. 1988).

otherwise be inadmissible hearsay.[3] Utah Code Ann. § 76-5-411 (Supp. 1983). Pursuant to these statutes, the child, who was five years old at the time of trial, testified and some of his out-of-court statements were admitted. Eldredge terms the trial court's reliance on sections 76-5-410 and -411 "ex post facto" because those statutes became effective after the crimes were committed but before the trial.

The first step in resolving this claim is to determine the scope of the federal constitutional prohibition against ex post facto laws. The United States Supreme Court has defined as ex post facto any law that operates to make criminal an act that was innocent when done, to increase the punishment for a crime after its commission, or to allow conviction on less proof in amount or degree than was required when the offense

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[3] At the time of Eldredge's trial, section 76-5-411 read as follows:

> (1) Notwithstanding any other provision of law or rule of evidence, a child victim's out of court statement regarding sexual abuse of the child is admissible into evidence though it does not qualify under an existing hearsay exception, so long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge shall determine whether the general purposes of the evidence are such that the interest of justice will best be served by admission of the statement into evidence. In addition, the court shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness, in deciding whether to admit such a statement.
>
> (2) A statement may be admitted under this exception only if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with an opportunity to prepare to meet it, his intention in offering the statement, and the particulars of it.
>
> (3) For purposes of this section, a child is a person under the age of ten.

Utah Code Ann. § 76-5-411 (Supp. 1983). This language was modified in 1985 and again in 1988, but any changes pertinent to this case do not appear to have been of substance. See State v. Nelson, 725 P.2d 1353, 1355 nn.2 & 3 (Utah 1986); Utah Code Ann. § 76-5-411 & compiler's notes (Supp. 1988).

was committed.[4] See Dobbert v. Florida, 432 U.S. 282, 292-94, reh'g denied, 434 U.S. 882 (1977); Beazell v. Ohio, 269 U.S. 167, 169-70 (1925); Thompson v. Missouri, 171 U.S. 380, 383-85, 387 (1898); Hopt v. Utah, 110 U.S. 574, 589-90 (1884). Under this definition, "[s]tatutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes commited prior to their passage." Hopt, 110 U.S. at 589; accord Underwood v. State, 111 Tex. Crim. 124, 125, 12 S.W.2d 206, 206 (1927); State v. Clevenger, 69 Wash. 2d 136, 140-42, 417 P.2d 626, 629-30 (1966); State v. Slider, 38 Wash. App. 689, 693-95, 688 P.2d 538, 541-42 (1984) (statute similar to section 76-5-411). Similarly, the retroactive application of statutes that make previously inadmissible evidence admissible is not ex post facto. Thompson, 171 U.S. at 385, 387, reaffirmed in Beazell, 269 U.S. at 170-71.

We must examine sections 76-5-410 and -411 in light of these rules to determine whether their application was ex post facto. Section 76-5-410 allows children to testify who might otherwise have been disqualified under prior law. See State v. Fulton, 742 P.2d 1208, 1217 (Utah 1987), cert. denied, 108 S. Ct. 777 (1988). On its face, section 76-5-410 can be characterized as merely enlarging the class of persons competent to testify. And section 76-5-411 appears to do no more than allow the admission of otherwise inadmissible hearsay statements. Therefore, sections 76-5-410 and -411 do not appear to fall within the Supreme Court's definition of ex post facto laws.

Eldredge, however, argues that the Supreme Court has stated that the ex post facto provision prohibits retroactive application of laws that operate to deny a substantial right in existence when the crime was committed. See Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981); Thompson v. Utah, 170 U.S. 343, 354-55 (1898); Kring v. Missouri, 107 U.S. 221, 232, 235-36 (1883). He contends that the application of sections 76-5-410 and -411 to his case was prohibited by the

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[4] The federal constitution's ex post facto provision applies only to penal laws. See, e.g., Kring v. Missouri, 107 U.S. 221, 225, 227 (1883).

ex post facto provision because it actually operated to deny his federal constitutional right to confrontation as it existed at the time the crimes were committed.

First, Eldredge contends that allowing his son to testify pursuant to section 76-5-410 effectively denied him his right to confrontation because when the boy took the stand, as the statute permitted, his testimony was so equivocal and confused as to make meaningful cross-examination impossible. We disagree. A review of the record demonstrates that Eldredge's cross-examination was very effective, so effective that the child recanted and denied the abuse. Therefore, we conclude that section 76-5-410 did not operate to deny Eldredge's federal confrontation right. See State v. Marcum, 750 P.2d 599, 602-03 (Utah 1988).

Second, Eldredge argues that admission of his son's out-of-court statements pursuant to section 76-5-411 violated his right to confrontation because he could not effectively cross-examine the boy. This Court has held on several occasions that the admission of such hearsay does not abridge a defendant's right to confrontation if the child victim is present and available to testify and be cross-examined. Marcum, 750 P.2d at 603; State v. Loughton, 747 P.2d 426, 429 (Utah 1987); State v. Fulton, 742 P.2d at 1218-19; State v. Nelson, 725 P.2d 1353, 1356 (Utah 1986). Moreover, here the child actually testified and was cross-examined quite effectively. Finally, this argument, like Eldredge's argument with respect to section 76-5-410, has previously been rejected on similar facts. See Marcum, 750 P.2d at 602-03; Loughton, 747 P.2d at 429-30; Fulton, 742 P.2d at 1210-11, 1218-19 & n.16; Nelson, 725 P.2d at 1356-57.

Because the Supreme Court's definition of ex post facto laws does not encompass sections 76-5-410 and -411 and because we do not find a denial of Eldredge's right to confrontation, we reject his claim that their application to his case offended the ex post facto ban.[5]

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[5] This conclusion is not undermined by defense counsel's citation to dicta in Calder v. Bull, 3 U.S. 386, 390 (1798), which indicated that retroactive application of any change in the rules of evidence would be ex post facto.

Eldredge next claims that even if sections 76-5-410 and -411 can be applied to his case, the trial court misinterpreted their requirements and, as a result, misapplied both sections. We first address Eldredge's section 76-5-410 challenge, which is based on Utah Rule of Evidence 602.

Rule 602 states that a witness may testify only to those matters of which he or she has personal knowledge.[6] Eldredge contends that under this rule, testimony of a witness must be excluded if the witness's memory of the subject matter of the testimony is less than complete. He argues that his son's testimony indicated that the boy had virtually no memory of the events charged. Therefore, Eldredge concludes, the child's testimony should have been excluded.

Rule 602 is not amenable to such a broad construction. It merely requires that the witness have the opportunity and the capacity to perceive the events in question. See State v. Calamity, 735 P.2d 39, 42 (Utah 1987); Utah R. Evid. 602; Fed. R. Evid. 602 advisory committee's note; J. Weinstein & M. Berger, Weinstein's Evidence ¶602[02] (1987). Here there is no contention that the boy lacked personal knowledge of the incidents of abuse; the only question is how well he could remember the details.

We have previously explained, in a case dealing with the competency of a child sexual abuse victim, that lapses in memory are appropriately dealt with under Utah Rule of Evidence 403, which provides for the exclusion of testimony so unreliable that its potential for unfair prejudice substantially outweighs its probative value. See State v. Fulton, 742 P.2d at 1218 & n.15; Utah R. Evid. 403; J. Weinstein & M. Berger,

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That dicta has long since been rejected in cases which defense counsel failed to cite. See Beazell v. Ohio, 269 U.S. 167, 170-71 (1925); Thompson v. Missouri, 171 U.S. 380, 382 (1898); Hopt v. Utah, 110 U.S. 574, 590 (1884).

[6] Rule 602 provides in part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." Utah R. Evid. 602.

Weinstein's Evidence ¶ 601[04] (1987). Because Eldredge did not object to the child's testimony on rule 403 grounds either below or on appeal, we decline to address the question of whether his testimony should have been excluded under that rule.

Next, we address Eldredge's claim that the trial court, in admitting the boy's out-of-court statements, misinterpreted and misapplied section 76-5-411. As it read at the time of Eldredge's trial, that section required the trial court to determine whether the child victim's out-of-court statements satisfied one of two alternative tests contained in subparts (1) and (2) of subsection 76-5-411(1), as well as the test contained in the last two sentences of that subsection. State v. Nelson, 725 P.2d at 1355 n.3. Subparts (1) and (2) required either that the child testify or that other corroborative evidence of the abuse exist. The last two sentences of subsection 76-5-411(1) required the trial judge to determine whether the interests of justice would be served by admission of the statement and to consider the child's age and maturity, the nature and duration of the alleged abuse, the child's relationship to the accused, the statement's reliability, and the child's reliability. Utah Code Ann. § 76-5-411 (Supp. 1983) (quoted in footnote 3, supra).

As we observed in Nelson, the trial court must consider not only the factors listed in subsection 76-5-411(1), but also any other factors pertinent to a careful evaluation of the reliability of the out-of-court statements.

> Subsection 76-5-411(1) . . . addresses the trustworthiness [of a child victim's hearsay statements] by listing a number of factors the trial judge must consider before admitting such evidence. These factors are intended to prompt a comprehensive inquiry into all the circumstances surrounding the child's out-of-court statement in order to determine its reliability. It is noteworthy that subsection 76-5-411(1) requires a determination of reliability without regard to ... the hearsay [declarant's availability]. The importance of such an inquiry cannot be overemphasized.

> In any case involving a proffer of hearsay statements by a child victim, the trial court must make an in-depth evaluation of the proposed testimony as required by subsection 76-5-411(1). This inquiry may require consideration of some matters not specifically mentioned in the statute. For example, to determine the reliability of the statement, a court should consider how soon after the event it was given, whether the statement was spontaneous, the questions asked to elicit it, the number of times the statement was repeated or rehearsed, and whether the statement is reproduced verbatim in court, viz., tape recording, video tape, or otherwise.

725 P.2d at 1355 n.3 (citing Unif. R. Evid. 807 (1986 amendment to 1974 Unif. R. Evid.) (promulgated by National Conference of Commissioners on Uniform State Laws)).

After considering all the relevant factors, the court must make written findings and conclusions with respect to each factor.

> The ~~trial~~ court should then enter findings and conclusions regarding each of the factors listed in the statute to explain its reasons for admitting or excluding the testimony. Only when these steps are taken can a defendant be assured that the statutorily required appraisal has been made. Further, only when such steps are taken can this Court properly perform its appellate review function.

Nelson, 725 P.2d at 1355 n.3.

The trial court in this case did not make the required findings, and Eldredge now apparently contends that the child's statements should not have been admitted absent the findings. However, Eldredge neither requested that the Nelson findings be made nor objected to the admission of hearsay in their absence. Utah Rule of Evidence 103(a) requires "a clear and definite objection" at trial to preserve an evidentiary error for appeal. See State v. Malmrose, 649

P.2d 56, 58 (Utah 1982) (decided under former Utah Rule of Evidence 4, a predecessor to rule 103).

In an attempt to meet that requirement, Eldredge points out that his counsel did object to admission of the victim's testimony in the absence of a specific determination that the victim was competent to testify. The findings required by section 76-5-411 relate to the reliability of a victim's out-of-court statements, which is by no means equivalent to the victim's competency to testify at trial. State v. Fulton, 742 P.2d at 1219 n.16. An objection based on competency does not call the trial court's attention to the reliability issue. See id.; cf. State v. McCardell, 652 P.2d 942, 947 (Utah 1982) (foundation objection did not direct trial court's attention to potential prejudice). Therefore, we conclude that no proper objection was made on this issue. In the absence of an adequate objection, the error in applying section 76-5-411 cannot be considered on appeal. Marcum, 750 P.2d at 603.

Despite the failure to properly preserve the issue below, Eldredge argues that we should reach the merits of his claim because admitting the testimony without making the required findings was plain error. Utah Rule of Evidence 103(d) provides: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."[7] The first requirement for a finding of plain error is that the error be "plain," i.e., from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error. See State v. Poe, 21 Utah 2d 113, 117-18, 441 P.2d 512, 514-15 (1968), appeal after remand, 24 Utah 2d 355, 471 P.2d 870 (1970); State v. Cobo, 90 Utah 89, 102, 60 P.2d 952, 958 (1936); cf. State v. McCardell, 652 P.2d at 947 (incorrect objection did not bring error to trial court's attention; not plain error under former rule 4). The second and somewhat interrelated requirement for a finding of plain error is that the error affect the substantial

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[7] This rule is substantially similar to former rule 4. See State v. Poe, 21 Utah 2d 113, 441 P.2d 512 (1968), appeal after remand, 24 Utah 2d 355, 471 P.2d 870 (1970); Utah R. Evid. 103(d) advisory committee's note.

rights of the accused, i.e., that the error be harmful.[8] See State v. Bullock, 699 P.2d 753, 756 (Utah 1985); State v. Lesley, 672 P.2d 79, 81-82 (Utah 1983); State v. Gardunio, 652 P.2d 1342, 1344 (Utah 1982) (per curiam); State v. Poe, 21 Utah 2d at 117-18, 441 P.2d at 515; State v. Cobo, 90 Utah at 102, 60 P.2d at 958.[9]

We first address the question of the error's plainness. The rule that an error not called to the trial court's attention will be considered only if it can be shown to have been "plain" permits rule 103(d) and rule 103(a) to coexist. The principle underlying rule 103(a)'s requirement of "a timely objection . . . , stating the specific ground of objection" is that in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate,

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[8] We note that the two plain error requirements of obviousness and harmfulness are related and that the obviousness requirement poses no rigid and insurmountable barrier to review. For example, the more harmful an error is, the more likely an appellate court is to conclude that it was objectively obvious, because a high degree of harmfulness might be expected to attract a trial court's attention. On the other hand, in appropriate cases we can exercise our discretion to dispense with the requirement of obviousness so that justice can be done, as when an error not readily apparent to the court or counsel proves harmful in retrospect.

This observation should make academic Justice Stewart's concern that the plain error requirements articulated here might frustrate our review of harmful errors. If his arguments were taken literally, we could have no articulated test for plain error and counsel would not know how to address the question on appeal. But no such abandonment of the attempt to state a legal standard is required. It is enough if we acknowledge, and the Bar and the public understand, that we are trying to spell out the considerations that will guide our discretion in determining whether to review a harmful error despite a procedural default. At bottom, the plain error rule's purpose is to permit us to avoid injustice. No statement of the factors that are important to our deliberations on the point should be read to limit our power to achieve that end.

[9] For an explanation of rule 103's requirement of harmfulness, see State v. Bishop, 753 P.2d 439, 499 (Utah 1988) (Zimmerman, J., concurring); State v. Hackford, 737 P.2d 200, 204 n.1 (Utah 1987); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987); State v. Rammel, 721 P.2d 498, 500 (Utah 1986). These cases establish that the harmfulness standard set forth in rule 103 is substantively identical to that of Utah Rule of Criminal Procedure 30. E.g., Bishop, 753 P.2d at 499.

correct it. See McCardell, 652 P.2d at 947. Normally, compliance by counsel with the contemporaneous objection requirement of rule 103(a) is assured because of the severe sanction that follows noncompliance: a refusal by the appellate court to consider the issue. However, the premise of rule 103(d) is that the ends of justice must not be lost sight of in the pursuit of procedural regularity and that when an error is plain, a trial court can legitimately be said to have had a reasonable opportunity to address and correct it, even in the absence of an objection.

In light of the purposes of the plainness requirement, can it fairly be said that the erroneousness of admitting the hearsay evidence without having first made the required findings should have been obvious to the trial court? The language of section 76-5-411 does not expressly require written findings regarding reliability, and the trial court did not have the benefit of an appellate decision interpreting the statute's requirement--Nelson had not yet been decided. See United States v. Petrozziello, 548 F.2d 20, 23 (lst Cir. 1977), cert. denied, 436 U.S. 947 (1978). We cannot conclude that the need for written findings should have been obvious. However, there is another closely related ground for exclusion that may form a basis for Eldredge's claim of error. Utah Rule of Evidence 403 requires the exclusion of evidence if its potential for unfair prejudice substantially outweighs its probativeness. Under that rule, the question is whether the hearsay evidence was sufficiently unreliable that it should have been obvious to the trial judge that the testimony's probativeness was substantially outweighed by its potential for unfair prejudice. On this record, we cannot say "yes."[10]

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[10] Other circumstances, however, might require a finding of plain error. For example, in a case in which a child declarant had, when first confronted with allegations of abuse, repeatedly denied that the abuse had taken place but admitted it under repetitious and coercive questioning, the potential unreliability of such hearsay and its consequent likelihood of causing unfair prejudice should be apparent to a trial court. Similarly, if a therapist testified to a child's hearsay statements regarding instances of abuse that were made during therapy sessions of which no records were kept, the unreliability of such testimony might also be plain.

Being unable to find that either the need for findings or the fact that the evidence's probativeness was outweighed by its potential for unfair prejudice should have been apparent to the trial court, we need not reach the second prong of the plain error rule--whether the admission of hearsay statements regarding instances of abuse that were made during therapy sessions of which no records were kept, the unreliability of such testimony might also be plain. hearsay had a substantial impact on the verdict.[11] And, because we do not find plain error, we do not reach the merits of Eldredge's claim.[12]

Eldredge next claims that the victim's therapist, Thomas Harrison, should not have been qualified as an expert in the diagnosis and treatment of child sexual abuse because he is a social worker rather than a psychiatrist or psychologist. Under Utah Rule of Evidence 702, trial courts have discretion in determining the qualifications of expert witnesses. See, e.g., State v. Espinoza, 723 P.2d 420, 421 (Utah 1986); G. Joseph, S. Saltzburgh & The Trial Evidence Committee of the American Bar Association Section of Litigation, Evidence in America: The Federal Rules in the States § 51.3, at 2 (1987). And attaining a particular academic degree may be irrelevant to the substance of the necessary training and experience. E.g., Jenkins v. United States, 307 F.2d 637, 644 (D.C. Cir. 1962) (en banc); Madison Granite Co. v. Industrial Comm'n, 138 Ariz. 573, 575-77, 676 P.2d 1, 3-5 (Ariz. App. 1983); 3

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[11] As we noted previously, the requirements of obviousness and harmfulness are related and an error may be so harmful that we should exercise our discretion to correct it regardless of the lack of either an objection or objective obviousness. However, this is not a case in which we can say that the error's harmfulness was so great that either it alone should have caught the trial court's attention or we should exercise our discretion to dispense with the requirement of obviousness in the interests of justice.

[12] Although the trial court's failure to make the written findings required by section 76-5-411 was not plain error in this case, such a failure may well be in another. For that reason, prosecutors would be wise to assure that a defendant's failure to request such findings does not result in a reversal. The obvious way for a prosecutor to prevent such a result is to make the request for findings him- or herself. The most suitable vehicle for exploring the issues raised by section 76-5-411 would be a hearing in limine. At such a hearing, whether requested by the State or the accused, the State would have the burden of establishing the reliability that the requirement of findings was designed to assure.

J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[04], at 702-25, 702-51 (1987). Our review of the record convinces us that Harrison has extensive qualifications in this area of expertise and that the trial court did not abuse its discretion by allowing him to testify.[13]

Eldredge next claims that the trial court should have admitted the results of polygraph examinations that he took which would have bolstered his claim of innocence. A stipulation between the State and the accused is presently required for the admission of polygraph test results. State v. Fulton, 742 P.2d at 1212; State v. Abel, 600 P.2d 994, 998-99 (Utah 1979). The reason for this rule is that polygraph data has not been shown to be sufficiently reliable to justify the tendency of a fact finder to be overawed by the test results and too willing to abdicate its difficult truth-finding function to an expert and his or her machine. See Fulton, 742 P.2d at 1212; Abel, 600 P.2d at 996-97; Utah R. Evid. 403, 702. The rationale for admitting polygraph results with a stipulation is not that the stipulation makes them any more reliable or any less likely to dominate the fact-finding process, but that it serves as a waiver. Id. at 997. There was no waiver in this case because the State refused to stipulate to admission of the polygraph results. Therefore, under Fulton and Abel, the results were inadmissible.

Eldredge nevertheless argues that the polygraph results should have been admitted as a quid pro quo to balance the testimony of Thomas Harrison, who, in essence, functioned as a human lie detector when he testified as to the credibility of the victim's out-of-court statements. Harrison's opinion that the child's statements were truthful was not a proper subject for testimony. However, the appropriate way for Eldredge to address the problem of Harrison's testimony would have been to raise an objection and seek to exclude it, not to attempt to counter the testimony with his own inadmissible polygraph evidence. We must reject his argument for the admission of the polygraph evidence.

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[13] The propriety of qualifying Harrison as an expert is unrelated to one of the issues we address next, the propriety of the substance of his testimony.

Eldredge next argues that the trial court erred when it limited the evidence demonstrating the bias of the victim's mother, Suzanne Sanchez. Eldredge contends that he was not permitted to cross-examine Sanchez adequately or to present direct evidence that she was motivated to testify against him by a bitter visitation dispute. In State v. Hackford, 737 P.2d 200, 203 (Utah 1987), we held that evidence of prior conduct showing a witness's bias or motive to testify falsely is admissible under Utah Rule of Evidence 608(c), subject to possible exclusion under Utah Rule of Evidence 403 if its potential for unfair prejudice outweighs its probativeness. We also noted that under some circumstances, the improper exclusion of such evidence may violate not only rule 608(c), but also the right to confrontation guaranteed by the federal constitution. Id. at 204; see Delaware v. Van Arsdall, 475 U.S. 673, 674, 677-79 (1986); U.S. Const. amends. VI, XIV.

A review of the record in this case reveals neither an abuse of discretion in applying the evidentiary rules nor a violation of the constitutional right to confrontation. Defense counsel was allowed to introduce evidence of the visitation dispute, including evidence of Sanchez's failure to make any allegations of sexual abuse until after she had been ordered to allow Eldredge his visitation rights. In closing argument, defense counsel stressed heavily Sanchez's purported bias against Eldredge and her motive to testify falsely, which resulted from the visitation battle. Under these circumstances, the trial court did not abuse its discretion or violate Eldredge's right to confrontation by refusing to allow cumulative evidence on this issue. See Utah R. Evid. 403.

Moreover, even if it could be said that the trial court had erred, any error was waived. When the issue of the visitation dispute came up and the State objected to defense counsel's continuing the line of questioning, the court stated that it was unwilling to allow counsel to elicit very much testimony on the visitation dispute, but that it would rule on the evidence's admissibility on a question-by-question basis. The trial court then admonished counsel to make a record by

asking the questions. After all this, defense counsel simply desisted in this line of questioning, thus effectively waiving this claim. See Utah R. Evid. 103(a).

Eldredge next asserts that the evidence at trial was insufficient to support the jury's verdict. In evaluating such a claim, we must view the record evidence in the light most favorable to the verdict. State v. Speer, 718 P.2d 383, 384-85 (Utah 1986) (citing State v. Petree, 659 P.2d 443, 444 (Utah 1983)); State v. Lamm, 606 P.2d 229, 231 (Utah 1980); State v. Booker, 709 P.2d 342, 345 (Utah 1985). Having reviewed the evidence in that light, we cannot say that as a matter of law, the evidence was insufficient to sustain the verdict.

Eldredge next asserts that even if not one of the errors he complains of requires reversal, their cumulative effect denied him a fair trial. The concept of reversible cumulative error does not apply to this case because we have been unable to find any error. See State v. Bishop, 753 P.2d 439, 489 (Utah 1988); State v. Rammel, 721 P.2d 498, 501-02 (Utah 1986). We have rejected the claims of error reached on the merits, and we have found that the remaining claims were waived.

Finally, Eldredge claims that the trial court erred in refusing to order a new trial or to arrest the judgment. He asserts that the court should have granted him such relief because Thomas Harrison, who played an important role in the State's case, stated after the conclusion of the trial that he was unsure of Eldredge's guilt. At trial, Harrison was not asked and did not express an opinion as to Eldredge's guilt. The bulk of his testimony related to his conclusion that the child had been abused by someone, although not necessarily by Eldredge. He did testify that the victim attributed the abuse to Eldredge and that he had no reason to doubt the child's truthfulness. The gist of Eldredge's argument is that the State knew of Harrison's doubts about Eldredge's guilt and should have informed Eldredge so that he could have brought out Harrison's uncertainty at trial to create a reasonable doubt. Therefore, the meritoriousness of Eldredge's claim depends on the admissibility of Harrison's opinion regarding Eldredge's guilt.

The standards for arresting a judgment or granting a new trial are set out in Utah Rules of Criminal Procedure 23 and 24(a). Rule 23 requires a trial court to arrest judgment on the motion of the accused if the facts proved at trial do not constitute a crime, if the accused is mentally ill, or for "other good cause." Utah R. Crim. P. 23. Rule 24(a) allows a trial court to grant a new trial on the motion of the accused if any error or impropriety in the trial had a "substantial adverse impact" on the rights of the accused. Utah R. Crim. P. 24(a). The question, then, is whether the facts recited above constitute either good cause for the arrest of the judgment or an error or impropriety that had a substantial adverse effect on Eldredge's rights.

Utah Rule of Evidence 702 governs the admissibility of expert opinion testimony. See Utah R. Evid. 702. In Kofford v. Flora, 744 P.2d 1343, 1347 (Utah 1987), this Court held that a foundational showing establishing the reliability of such evidence is required for its admission under rule 702. At a hearing on Eldredge's post-trial motions, it was shown that Harrison's doubts were based solely on Eldredge's failure to confess. This is not a foundation adequate to establish the reliability of any opinion as to Eldredge's guilt that Harrison might give at a new trial. Moreover, there is no reason to believe that any opinion of Harrison's as to Eldredge's guilt or innocence would be admissible, even if the foundation were stronger. See, e.g., State v. Rammel. Thus Harrison's opinion regarding Eldredge's guilt was inadmissible under rule 702, and the trial court could properly have denied Eldredge's motion for a new trial or an arrest of judgment on that ground.

We have considered Eldredge's other claims and find them to be without merit. The convictions are affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice

Christine M. Durham, Justice

HOWE, Associate Chief Justice: (Dissenting)

I dissent on the ground that the trial court committed reversible error in failing to make the determination required by Utah Code Ann. § 76-5-411(2) (Supp. 1988) that "the interest of justice will best be served by admission" of out-of-court statements made by the child victim regarding sexual abuse.

Six days prior to trial, the prosecutor served on defendant's counsel written notice of the State's intent to use hearsay testimony at the trial. That notice specifically stated that it was given pursuant to section 76-5-411 and advised defendant's counsel that the child's mother, his grandmother, and Thomas Harrison would testify concerning statements made to them by the child regarding sexual abuse. In response, defendant's counsel the following day filed his written "Motion to Limit Testimony." In that motion, he moved the trial court for a pretrial order limiting the use of hearsay testimony to which the State had given him notice. The first three grounds for the motion were:

> 1. The proposed hearsay is inconsistent with the child's testimony at the preliminary hearing.
>
> 2. There is not corroborative evidence of the child's statements and the alleged hearsay statements contradict the child's testimony.
>
> 3. Because of the age of the child at the time of the alleged offense the alleged statements are unreliable.

(Emphasis added.) Three other grounds were also stated: that the use of the hearsay statements would deny defendant his right of confrontation under the United States and Utah Constitutions; that section 76-5-410, which makes the child a competent witness, violates those constitutions since the child is an incompetent witness; and that sections -409 and -410 should not be relied upon in this action since the alleged

offenses took place before their enactment and the admission of the child's testimony would be ex post facto and violate the United States and Utah Constitutions.

The first three grounds of the motion quoted above were clearly based on the provision in section 76-5-411(2) which provides that in determining whether to admit the out-of-court statements of the child,

> the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child.

(Emphasis added.)

The motion was heard the morning of the first day of trial. Much of the argument made by defense counsel and by the prosecutor centered around whether the changes effected by sections 76-5-410 and -411 were ex post facto. Defense counsel also sought to have the court examine the child victim in chambers to determine his competency to be a witness and to restrict the use of leading questions to him. While these arguments did not focus on the requirements of section 76-5-411(2) set forth above, other argument did specifically focus on the admissibility of the hearsay statements made by the child and the effect of section -411. At one point, defense counsel said:

> I have filed a pretrial motion to limit them from using hearsay, as soon as I received their notice to intend to use the hearsay.

Later, the prosecutor said:

> I would state, your honor, it is clear that this hearsay is applicable to our situation. I would also add that it is clear that the legislature intended that cases be handled in this manner and I think in drafting the present statute, the legislature was taking into account the reliability, the inherent source of reliability that there is in these sort of hearsay statements, where a child will

> say to his mother after something has happened to him something like in this case . . . . I would indicate to the court that there is a certain inherent believability, reliability, if you will, about this hearsay testimony that makes it similar to the other hearsay exceptions. And I believe this is why it has been treated differently and I would suggest to the court that that is the intention.

In response, defense counsel stated:

> What they [the prosecution] are attempting to use here is a complete change in the rules. Under this section 411, it talks about hearsay. If you read that section of the law, it is such a drastic change, they had to enact certain procedures about the Judge's findings. It is such a change against the traditional laws about using out-of-court hearsay statements in situations such as this . . . .

At the close of counsel's argument, the court ruled that "they can use the hearsay testimony. . . . The court is going to grant to the defense the objection at the outset, a continuing objection as to any hearsay questions which do come in throughout the course of the examination of the child." At trial, defense counsel on at least two occasions objected to the admission of out-of-court statements made by the child, and in each case, the court overruled the objection based on its earlier pretrial ruling.

In light of the above, I conclude that the trial court should have been alerted to its duty to make the reliability determination required by section 76-5-411(2). The court had before it defendant's written motion to limit testimony, which was filed in response to the State's notice of intent to use hearsay statements made by the child. Three of the grounds of defendant's motion were that the child's statements were unreliable. Defendant's written motion, together with the argument of both the prosecutor and defense counsel set out above, should have alerted the trial court to the necessity of making the determination required by section -411(2). As was pointed out in State v. Nelson, 725 P.2d 1353 (Utah 1986),

the admission of a child victim's hearsay statements constitutes a drastic departure from our rules of evidence, and the legislature intended that those statements be admissible only after a very careful screening made by the trial court to determine, among other things, their reliability. I agree with the majority that because our decision in State v. Nelson had not then been handed down, the trial court may not have realized the necessity of making written findings. However, a casual reading of section -411 makes it clear that the court should make a determination of the reliability of the child victim's testimony. I find nothing in the record where the trial court did so. The State concedes that the trial court did not rule on the reliability of the child's statements. The hearsay statements were admitted without any screening to determine if the "interests of justice will best be served" by their admission. I strongly disagree with the majority that defense counsel did not focus the trial court's attention to reliability. Having made a written motion to exclude the hearsay statements and having referred the court to section -411 in his argument on that motion, it is difficult for me to understand what more he could have done to exact a reliability determination from the trial court. Our rules do not require counsel to object to the denial of a motion by the court in order to preserve the point on appeal, as the majority seems to require.

Even if it is conceded that defendant did not sharply focus the trial court's attention to the requirements of section -411(2), I would hold that the error was plain error and that we should reach it in this appeal. I believe that it was plain error because the trial court had its attention called to sections -410 and -411, and it is inconceivable to me that a child abuse case, with its radical departure from the rules of evidence, could be tried without giving those sections notice. Even the most cursory glance at section -411 would alert the trial court to the necessity of determining the reliability of the child's out-of-court statements.

I conclude that this error was prejudicial. The child at the time the alleged offenses occurred was only two years of age. He was only five years of age at the time of trial. Thus, in his testimony at trial, he was recalling incidents which

occurred between two and three years earlier. A few months before the child turned three, his mother brought a petition to modify the decree of divorce to limit defendant's visitation rights with the child. Even though her testimony at trial in the instant case placed three of the alleged sexual abuse incidents prior to the filing of her petition, nothing was mentioned or suggested in the petition about sexual abuse. Most importantly, however, the child's testimony continually changed, and he contradicted himself to the point of even denying that any abuse ever took place. There was no independent evidence which corroborated that sexual abuse ever took place other than statements the child allegedly made to his mother, his grandmother, and Mr. Harrison. In view of these circumstances, the section -411 determination as to the reliability of the child's out-of-court statements was imperative.

Stewart, Justice, concurs in the dissenting opinion of Associate Chief Justice Howe.

STEWART, Justice: (Dissenting)

I concur with Associate Chief Justice Howe's dissenting opinion. I write separately because I disagree with the majority's discussion of the plain error rule. The majority states that the standard for determining whether there is plain or manifest error is "from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error." The requirement that the error be plain to the trial court arises from the majority's concern that, while the ends of justice should "not be lost sight of in the pursuit of procedural regularity," nevertheless, the trial court should "legitimately be said to have had a reasonable opportunity to address and correct it, even in the absence of an objection."

The majority opinion quite properly points out that the fundamental fairness of a trial may not be sacrificed to procedural technicalities based upon a defendant's failure to object in the trial court. However, if the majority's language is to be taken at face value, the implication of the majority rule is that plain error--no matter how egregious—cannot be noticed and acted upon by this Court if the trial court would not have recognized the error as being plain.[1] In truth, this Court has never adopted such a stingy application of the plain error doctrine. It is also clear that we have never indicated that we would search the record for error. It can hardly be maintained that an appellate court in the proper conduct of its business can, or should, spend the time searching for error in a case and in effect re-lawyer the entire matter from the ground up. Quite clearly, we have on a number of occasions noticed plain error and reversed trial court rulings when it was perfectly obvious that the error was not plain to the trial court. Indeed, in State v. Wood, 648 P.2d 71 (Utah), cert. denied, 459 U.S. 988 (1982), we reversed the trial court's standards for determining when the death penalty should be applied even though the trial court thought that it was carrying out the prior opinions of this Court. Indeed, the trial court's position in that case was not without foundation. And in State v. Stenback, 78 Utah 350, 365, 2 P.2d 1050, 1056 (1931), this Court addressed a point that had not been raised or argued on appeal, even though an objection had been made in the trial court and improperly sustained. Thus, the error, from the point of view of plain

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[1] It is true that the majority attempts to hedge its rule by declaring that the obviousness and harmfulness standards are related and by stating that "an error may be so harmful that we should exercise our discretion to correct it regardless of the lack of either an objection or objective obviousness." Majority opinion at note 11. Despite the majority's protestations that it is merely attempting to articulate a test and "spell out the considerations that will guide our discretion in determining whether to review a harmful error," the majority opinion does not clarify the standard of review to be applied in such cases for either members of the bar or this Court. In fact, the majority opinion sets one standard in the text and then retreats from that standard in footnotes.

Furthermore, the standard articulated in the text by the majority erects an artificial barrier before defendants raising an issue on the basis of plain error. In my view, the Court should not in the future use the majority's procedural barrier to justify not reaching issues which should be reached on the basis of plain error simply because a majority of the Court cannot agree that the error was or should have been obvious to the trial court.

error analysis, was counsel's failure to raise on appeal the trial court's error. Counsel's error would not, and could not, have been known by the trial court.

As far as plain error is concerned, the doctrine clearly goes beyond the scope of rules of procedure. It is a doctrine which goes to the very heart of the adjudicatory process and therefore involves, at least in most cases, fundamental constitutional questions. All that our cases have required by way of standards for invoking the doctrine is the rather general requirement that the error must be palpable and "made to appear on the face of the record and to the manifest prejudice of the accused . . . ." State v. Cobo, 90 Utah 89, 102, 60 P.2d 952, 958 (1936).

If the standard is drawn too narrowly, we simply put off consideration of reversible error until the case returns on a writ of habeas corpus. At that time, under the standards which we employ in those cases, we would then be compelled to entertain the question of whether the trial was fundamentally fair, irrespective of whether there were appropriate objections. See, e.g., Chess v. Smith, 617 P.2d 341 (Utah 1980). There simply is no reason for delaying such an inquiry; indeed, the whole thrust of criminal procedure in the area of appellate review of criminal convictions has been to try to avoid, where possible, collateral attacks on criminal convictions. For that reason, it makes sense to address at the earliest possible stage errors which might lead to reversals.

Furthermore, from the point of view of the liberty of individuals involved, it is intolerable to tell those persons who are imprisoned as a result of legal error that a procedural error on the part of their attorney has resulted in the forfeiture of rights, simply because the error, manifest though it may be, was not plain to the trial judge. I certainly cannot embrace that concept; I doubt that the majority embraces it, but it seems to me that the effect of the majority opinion is to reach that result.

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

March 30, 1989

OFFICE OF THE CLERK

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The State of Utah,

Plaintiff and Appellee,

v. No. 20558

Richard M. Eldredge,

Defendant and Appellant.

THIS DAY, Petition for Rehearing having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that a rehearing be, and the same is, denied.

Geoffrey J. Butler, Clerk